85-1338

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD W. WYAND, SR., ROY MILLER SNYDER, JR., AND ALBERT L. BRYAN,

Petitioners,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTION PRESENTED

Does Maryland's exemption from the gambling prohibition granted civic and fraternal organizations deny other citizens equal protection?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. ___

Richard W. Wyand, Sr.,
Roy Miller Snyder, Jr., and
Albert L. Bryan, Petitioners

v.

State of Maryland, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

The Petitioners, Richard W. Wyand, Sr., Roy Miller Snyder, Jr., and Albert L. Bryan respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Maryland entered in this proceeding on December 13, 1985.

QUESTION PRESENTED

Does Maryland's exemption from the gambling prohibition granted civic and fraternal organizations deny other citizens equal protection?

OPINION BELOW

The opinion of the Court of Appeals of Maryland, appears at ___ Md. ____ (1985), 301 A.2d 483 (Md. 1985) and in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on December 13, 1985 and this petition is filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Fourteenth Amendment, Section 1:

"...nor deny to any person within its jurisdiction the equal protection of the laws."

2. Article 27, Section 255, Maryland Annotated Code:

(a) Applicable counties. - The provisions of this section apply to the following counties:

(18) Washington County.

(b) Generally. - (1) This subtitle may not be construed to make it unlawful for any volunteer fire company or bona fide fraternal, civic, war veterans', religious or charitable organization or corporation to conduct or hold a carnival, bazaar, or raffle for the exclusive benefit of any such volunteer fire company or fraternal, civic, war veterans', religious or charitable organization or corporation, if no individual or group of individuals benefits financially from the holding of any bazaar, carnival, or raffle or receives or is paid any of the proceeds from any carnival, bazaar, or raffle, for personal use or benefit.

STATEMENT OF THE CASE

The petitioners were charged and convicted of various violations of Maryland's gambling statutes in the

District Court of Maryland for Washington County. Upon an appeal and trial de novo to the Circuit Court for Washington County, they successfully moved to dismiss the charges against them contending that the exemption in the gambling laws for civic, fraternal and religious organizations, etc. violated their right to equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution. The Trial Court agreed and dismissed the charges citing the Equal Protection Clause. On appeal by the State, the Court of Appeals for Maryland reversed holding that the challenged legislation was not in violation of the Fourteenth Amendment's Equal Protection Clause.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with a decision of another State Court of

last resort and with the thrust of the decisions of this Court construing the Equal Protection Clause.

Maryland's criminal statutes generally prohibit gambling with the exception noted above for various religious, fraternal, civic, etc. organizations. That exemption from the gambling laws, on its face, and as applied, violates the Fourteenth Amendment's Equal Protection Clause in that it serves no rational purpose. See Cleburne v. Cleburne Living Center, 473 U.S. ___, 105 S.Ct. 3249, 87 L.E.2d 313 (1985).

Indiana had a similar statute and its Court in Fairchild v. Schanke, 113 N.E.2d 159 (1953) struck it down holding that it rested upon no rational purpose.

The clear purpose of Maryland's exemption was to assist the alleged

charitable activities of these organizations. The sponsor of the legislation extending the exemption to Washington County, Senator Corderman, was also the Trial Judge in this case and thus was uniquely qualified to divine the legislative intent.

That legislative intent is established in f.n.1 in the Trial Judge's Memorandum and Opinion. That legislative intent was to allow the exemption because of the charitable purposes of the clubs. As such, a rational basis existed in theory for the legislation. However, in fact, as the Trial Judge clearly established in his Opinion, the money raised by gambling was not going to charity but to establish large social halls, and large food and liquor operations to be patronized by members and the general public. The

Trial Judge noted the parsimonious nature of these organizations and that the money was not going to charity but was being used by these clubs to under-sell competing taverns and restaurants.

The rational purpose for the legislation was charity but as the learned Trial Court found, the gambling was not used for that purpose or even for the benefit of the club but merely as a means of subsidizing food and drink of club members and members of the public at large. As such, the rational purpose of the legislation was shown to be non-existent and absent such a rational purpose, it violates the Fourteenth Amendment.

The Maryland Court of Appeals below erred in its equal protection analysis by speculating that there may

have been any number of valid reasons why the legislature might have wanted to allow private organizations to augment their treasury by permitting gambling. No speculation was needed. The clear legislative purpose of the Act, and found as a fact by the Trial Judge and sponsor of the legislation, was to allow the gambling to assist charities. That noble promise did not occur.

The legislative exemption established that no individual, as opposed to the entity itself, should benefit from the gambling. In fact, many individuals benefited, both member and non-member alike, from the subsidized food, drink and dance halls. The Maryland Court of Appeals glossed over that issue and held that if the organization, and thus its membership benefited, there was no violation of the exemption. That

decision ignored the Trial Court's factual findings that not merely individual members of the clubs benefited, but members of the public at large patronizing those clubs.

In short, the rational purpose for the legislation was for charity and not for individuals. The lack of charity being established, as a matter of fact, no rational basis exists for the defendants being prosecuted for performing the identical acts as club members. Both perform the same acts, both use the gambling proceeds primarily for their own purposes, yet only some are prosecuted.

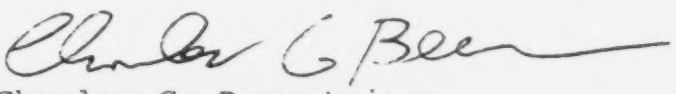
Even if one were to argue that the statute were constitutional on its face, in its application, as shown by the Trial Judge's findings, the legislation is unconstitutional as applied. See

Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.E.2d 220 (1886).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of Maryland.

Respectfully submitted,



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February, 1985

APPENDIX

1. Slip Opinion, Court of Appeals of Maryland.

2. Memorandum Opinion from the Circuit Court for Washington County.

IN THE COURT OF APPEALS OF MARYLAND

No. 48

SEPTEMBER TERM, 1985

STATE OF MARYLAND

v.

RICHARD W. WYAND, SR.,
ROY MILLER SNYDER, JR.,
and
ALBERT L. BRYAN

Murphy, C.J.
Smith
Eldridge
Cole
Rodowsky
Couch
McAuliffe,
JJ.

Opinion by Smith, J.

Filed: December 13, 1985

We shall here hold that Maryland Code (1957, 1982 Repl. Vol., 1984 Cum. Supp.) Art. 27, Section 255(a), (b), providing exemptions from the gaming laws in certain of the counties of the State, including Washington County, for certain organizations is constitutional. Accordingly, we shall reverse the decision of the Circuit Court for Washington County which held to the contrary and dismissed the charges against appellees Richard W. Wyand, Sr., Roy Miller Snyder, Jr., and Albert L. Bryan.

Snyder was convicted in the District Court in Washington County of violation of Code (1957) Art. 27, Section 237 pertaining to keeping a gaming table; Code (1957) Art. 27, Section 356 relative to selling lottery tickets; Code (1957) Art. 27, Section

360 pertaining to keeping a place for selling, etc., of lottery tickets, and Code (1957, 1982 Repl. Vol.) Art. 27, Section 362 as to possession of lottery tickets. His employees, Messrs. Bryan and Wyand, were each convicted of violations of Section 356, selling lottery tickets, and Section 362, possession of lottery tickets. They all appealed to the Circuit Court for Washington County.

In the circuit court the defendants filed a motion to dismiss. They asserted that "(t)he essence of the four charges" was that at Snyder's place of business they were operating "a lottery in the form of 'tip jars' and a 'poker' machine, and that those patrons who won would receive a monetary prize." They referred to the provisions of Code (1957, 1982 Repl. Vol., 1984 Cum. Supp.) Art. 27,

Section 255 and said that "this statute would exempt the activities for which (they were being) prosecuted from being proscribed gambling, if they had been carried on by one of the types of organizations enumerated therein."[1] The

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[1] Code (1957, 1982 Repl. Vol., 1985 Cum. Supp.) Art. 27, Sec. 255 as to that which is here in dispute is identical with the 1984 cumulative supplement. Section 255(a) lists the counties to which the section is applicable. Washington County is one of those counties. Section 255(b) provides in relevant part:

> "(1) This subtitle may not be construed to make it unlawful for any volunteer fire company or bona fide fraternal, civic, war veterans', religious or charitable organization or corporation to conduct or hold a carnival, bazaar, or raffle for the exclusive benefit of any such volunteer fire company or fraternal, civic, war veterans', religious or charitable organization or corporation, if no individual or group of individuals benefits financially from the holding of any bazaar, carnival, or raffle or receives or is paid any of the proceeds from any carnival, bazaar, or raffle, for personal use or benefit.

motion "concede(d) that the State, as a matter of constitutional law, does have the right to regulate gambling and also that it would be proper from said standpoint to exempt gambling in the enumerated organizations if (i) all the net proceeds were returned to the players, or (ii) all net proceeds were devoted to

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> "(2) The organization or corporation may award prizes in cash or in merchandise by such devices as are commonly designated as paddle wheels, wheels of fortune, chance books, bingo, or any other gaming device."

The trial judge in his opinion referred to Sec. 255(a). The statute here under discussion appeared as Sec. 255(a) in the 1982 replacement volume of the Code. It has since been amended. We applied the statute in American Legion v. State, 294 Md. 1, 447 A.2d 842 (1982).

Section 255 had its genesis in Chapter 679 of the Acts of 1949 applicable only to Caroline County. That act was subject to referendum by the voters of Caroline County at the General Election of 1950. Other counties have been added over the years.

religious, charitable, civic, or benevolent purposes without any of the net profits going to the benefit of the members of the clubs themselves." The motion went on to aver "that in fact the clubs in Washington County that operate gambling operations, including the same type as is involved in this case, utilize the net profits therefrom for the general benefit of the members themselves in that the net proceeds are normally deposited among the general revenues of the club." Accordingly, it was contended that the result of the section in question was to deny these appellees equal protection of the law under U.S. Const. amend. XIV and Md. Declaration of Rights art. 24.

The matter came on for hearing in the circuit court. Records of a number of organizations in Washington County

coming within the purview of Section 255(b) were subpoenaed and produced in court along with testimony as to their operations. The trial judge said:

> "There is no justifiable, legitimate reason to grant such privileges as those bestowed by Section 255(a) to such fraternal and veterans' organizations. Such legislation does, in fact, constitute class legislation in its purest sense. It is discriminatory, arbitrary and has no reasonable relationship to the subject matter of the gaming or lottery subtitles.
>
> "It should be noted that no credible evidence was offered or produced by the State of any substantial reason in support of the classification attempted by Section 255(a).
>
> "This Court believes that the Defendants here have met their heavy burden of proof. The conduct engaged in by the Defendants is a crime and that conduct is not a crime when engaged in by fraternal and/or veterans' organizations. The statutory discrimination established by Section 255(a) is not based on differences which are reasonably related to the purpose of the Acts in which it is found and the distinction as applied to fraternal and veterans' organizations has no relevance to the purpose

> for which the classification is made. It clearly denies these Defendants equal protection of the laws in violation of the 14th amendment of the Federal Constitution and Article 24 of the Maryland Declaration of Rights.
>
> "Having found such a violation, it is the holding of this Court that 255(a) of Article 27 is unconstitutional and void. The motion of the Defendants shall be granted and the charges against each Defendant shall be dismissed."

Pursuant to the provisions of Code (1974, 1984 Repl. Vol.) Sec. 12-302(c)(1), Courts and Judicial Proceedings Article, the State entered an appeal to the Court of Special Appeals. We granted the State's petition for a writ of certiorari prior to the time that the case came on for argument in the intermediate appellate court.

We begin with the proposition that courts do not pass upon the wisdom of statutes nor approve or disapprove of them. The function of the courts, if and

when the question is raised, is to ascertain whether the statute exceeds constitutional limits. Salisbury Beauty Schools v. St. Bd., 268 Md. 32, 48, 300 A.2d 367, 378 (1973); McBriety v. Baltimore City, 219 Md. 223, 233, 148 A.2d 408, 414 (1959); Givner v. Commissioner of Health, 207 Md. 184, 192, 113 A.2d 899, 903 (1955).

Although the Maryland Constitution contains no express equal protection clause, we have said that we deem it settled that this concept of equal treatment is embodied in the due process requirement of Article 24 of the Maryland Declaration of Rights. Attorney General v. Waldron, 289 Md. 683, 704, 426 A.2d 929, 940-41 (1981). In fact, in Bureau of Mines v. George's Creek, 272 Md. 143, 156, 321 A.2d 748, 755 (1974), Chief Judge Murphy said for the Court that

"the decisions of the Supreme Court on the Fourteenth Amendment are practically direct authorities...." We said, however, in Waldron "that each provision is independent, and a violation of one is not necessarily a violation of the other." 289 Md. at 714, 426 A.2d at 946.

Last summer in Cleburne v. Cleburne Living Center, 473 U.S. ____, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), Justice White declared for the Court:

> "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike. Plyler v. Doe, 457 U.S. 202, 216 (1982). Section 5 of the Amendment empowers Congress to enforce this mandate, but absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection. The general rule is that legislation is presumed to be

> valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. Schweiker v. Wilson, 450 U.S. 221, 230 (1981); United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 174-175 (1980); Vance v. Bradley, 440 U.S. 93, 97 (1979); New Orleans v. Dukes, 427 U.S. 297, 303 (1976). When social or economic legislation is at issue, the Equal Protection Clause allows the states wide latitude, United States Railroad Retirement Board v. Fritz, supra, at 174; New Orleans v. Dukes, supra, at 303, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." 473 U.S. at ___, 105 S.Ct. at 3254, 87 L.Ed. 2d at 320.

The classifications here do not pertain to race, alienage, national origin, or fundamental rights mentioned in Cleburne as requiring strict scrutiny, or gender or illegitimacy, there mentioned as calling "for a heightened standard of review." Accordingly, as put in Cleburne, "the Equal Protection Clause requires only a rational means to serve a

legitimate end."

In Supermarkets Gen. Corp. v. State, 286 Md. 611, 409 A.2d 250 (1979), Judge Orth said for the Court:

> "The basic rule is that there is a presumption of the constitutional validity of statutes. We put it thus in Edgewood Nursing Home v. Maxwell, 282 Md. 422, 384 A.2d 748 (1978):
>
> > A statute enacted under the police power carries with it a strong presumption of constitutionality and the party attacking it has the burden of affirmatively and clearly establishing its invalidity; a reasonable doubt as to its constitutionality is sufficient to sustain it.... In other words, the legislature is presumed to have acted within constitutional limits so that if any state of facts reasonably can be conceived that would sustain the constitutionality of the statute, the existence of that state of facts as a basis for the passage of the law much be assumed. (Id. at 427.)
>
> Accord: Condominium Owners v. Supervisor, 283 Md. 29, 388 A.2d 116 (1978); Davidson v. Miller, 276 Md. 54, 69-70, 344 A.2d 422

(1975), quoting Salisburg v. Maryland, 346 U.S. 545, 553 n.9, 74 S.Ct. 280 (1954)." 286 Md. at 616-17, 409 A.2d at 253.

To like effect see Hornbeck v. Somerset Co. Bd. of Educ., 295 Md. 597, 642, 458 A.2d 758, 782 (1983), and Governor v. Exxon Corp., 279 Md. 410, 439, 370 A.2d 1102, 1118 (1977), aff'd 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed. 2d 91 (1978).

The exemption is for "any volunteer fire company or bona fide fraternal, civic, war veterans', religious or charitable organization or corporation...." The funds derived are to be "for the exclusive benefit of any such volunteer fire company or fraternal, civic, war veterans', religious or charitable organization or corporation...." No part of the proceeds is to accrue to the personal use or benefit of anyone other

than the enumerated organizations.[2] The fact that the organization and thus its membership conducting the gambling may benefit financially from it does not come within the prohibition against any "individual or group of individuals benefit(ing) financially from the holding of any bazaar, carnival, or raffle...." The property of most of these organizations is exempt from real and personal property taxes. See Code (1957, 1980 Repl. Vol.) Art. 81, Sec. 9. Certainly, as a general proposition of law the promotion of general charitable, civic, educational and public safety purposes is a proper object of legislation.

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2 We note specifically that, contrary to certain assumptions appearing in the press, there is no requirement that any portion of the profits accruing from such operations are to be dedicated to any charity other than the organization conducting the carnival, bazaar, raffle, etc.

The General Assembly could well have concluded that the types of organizations mentioned in Sec. 255(b) were ones contributing by their presence to the general welfare and well-being of the communities in which they exist just as it reached a similar conclusion when it provided the exemptions of Art. 81, Sec. 9. The appellees draw aim only at fraternal and war veterans' organizations. As to the veterans' organizations the General Assembly might well have concluded that the service of the members to their country was itself reason for special consideration just as there have been statutes providing for special consideration in the hiring of such veterans by the State and providing that military service during time of war shall be counted toward retirement of State employees after a certain amount of

State service. See Code (1957, 1983 Repl. Vol., 1985 Cum. Supp.) Art. 64A, Sec. 18, and Code (1957, 1983 Repl. Vol., 1985 Cum. Supp.) Art. 65, Sec. 88, respectively. The General Assembly might well have had reasons similar to those put forth in response to a somewhat similar challenge in State v. Gedarro, 19 Wash. App. 826, 579 P.2d 949 (1978), where the court said:

> "Underlying the gambling act, and consonant with the legislative recognition that professional gambling is interrelated with organized crime, are policies which attempt to restrain personal profits realized through professional gambling activities and to discourage participation in such activities. RCW 9.46.030 is consistent with the State's interest to suppress moral decay and criminal propensities that accompany professional gambling because (1) it permits the public to engage only in pastimes that tend more toward amusement than profit, and (2) it promotes the public interest in supporting charitable activities, thus differentiating between gambling for profit and professional

> fund raising by a bona fide charitable organization." 19 Wash. App. at 830, 579 P.2d at 951.

Also, the General Assembly could have reasoned as did the court in State v. McCleary, 65 N.C. App. 174, 308 S.E.2d 883 (1983), aff'd per curiam, 311 N.C. 397, 316 S.E.2d 870 (1984):

> "The legislature in 1979 could reasonably have concluded that bingo games and raffles are not inherently immoral, and that they do not have a totally pernicious influence on the character of the player. Further, that the player's motivation of personal gain through gambling is tempered by the knowledge that his or her 'donation' is going to generally charitable or public service purposes. In addition, it could reasonably be determined that the consequences to society are not the same as those where the profit goes to commercialized gambling, or that the danger to society is different from that posed by professional gambling inasmuch as the game operator is, for example, a regulated charitable or religious organization and not a 'fakir' or 'nimble trickster.' See State v. Lipkin , (169 N.C. 265, 84 S.E. 340 (1915))." 65 N.C. App. at 188, 308 S.E.2d at 893.

The concession of the appellees in their motion to dismiss that this statute would be a valid one if it required that all net proceeds be "returned to the players" or if it required that all net proceeds be "devoted to religious, charitable, civic or benevolent purposes without any of the net profits going to the benefit of the members of the clubs themselves" amounts to a challenge to the wisdom, not to the constitutionality of the section in question. Wheeler v. State, 281 Md. 593, 380 A.2d 1052 (1977), cert. denied, 435 U.S. 997, 98 S.Ct.2d 1650, 56 L.Ed. 2d 86 (1978), relied upon by the trial court and by the appellees, is distinguishable upon its facts and does not command a different result.[3]

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[3]The trial court did not address the issue of whether Section 255(a), (b) was

We hold that a rational basis exists for the enactment of Section 255(a), (b). Consequently, it is constitutional and the motion to dismiss was improperly granted.

JUDGMENT REVERSED AND CASE REMANDED TO THE CIRCUIT COURT FOR WASHINGTON COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; APPELLEES TO PAY THE COSTS.

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severable from the remainder of the gambling statute. If it were, obviously that would leave standing the sections under which these person were convicted. We, therefore, have chosen to address directly the issue passed upon by the trial judge.

IN THE CIRCUIT COURT
FOR WASHINGTON COUNTY, MARYLAND

STATE OF MARYLAND	*	NO. 3885 CRIMINAL
VS.	*	APPEALS
RICHARD W. WYAND, SR.	*	
* * * *		
STATE OF MARYLAND	*	NO.3886 CRIMINAL
VS.	*	APPEALS
ROY MILLER SNYDER, JR.	*	
* * * *		
STATE OF MARYLAND	*	NO. 3887 CRIMINAL
VS.	*	APPEALS
ALBERT L. BRYAN	*	

MEMORANDUM OPINION

This case presents a question concerning the scope of and interrelationship between Maryland Code (157, 1982 Repl. Vol.) Art. 27, Sec. 255(a) and Sec. 356-Sec. 371B.

More particularly, it presents the question whether Sec. 255(a) which permits certain unlimited gambling

activities to be conducted by fraternal or veterans' organizations, denied the Defendants equal protections of the law by establishing a class which is exempt from the operation of the State's gaming and lottery statutes.

Richard Wyand, Sr., Roy M. Snyder, Jr. and Albert L. Bryan (Defendants) were all convicted in the District Court for Washington County of violating various sections of Article 27 relating to illegal lotteries. They have appealed to the Circuit Court for Washington Count and here all have sought dismissal of the charges against them.

The Defendants allege that Article 27, Section 255(a), which permits certain gambling activities to be conducted by certain organizations, is in violation of the 14th Amendment of the U.S. Constitution and Article 24 of

the Declaration of Rights of the Maryland Constitution.

Article 27, Section 255(a) says in pertinent part that:

> "(a) Generally-- This subtitle may not be construed to make it unlawful for any volunteer fire company or bona fide fraternal, civic, war veterans', religious or charitable organization or corporation in *** Washington County to conduct or hold a carnival, bazaar or raffle for the exclusive benefit of any such volunteer fire company or fraternal, civic, or veterans, religious or charitable organization or corporation, if no individual or group of individuals benefits financially from the holding of any bazaar, carnival or raffle or receives or is paid any of the proceeds from any carnival, bazaar or raffle, for personal use or benefit. ***."

It is the contention of the Defendants that gambling activities conducted pursuant to Section 255(a) become illegal when conducted by the Defendants and that the difference or distinction between the two has no

reasonable relationship to the conduct which is to be regulated. This Court agrees.[1]

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[1]The history of so-called "club gambling" in Washington County is a long and sorry one. This most recent chapter really began after the election of 1974. At that time, limited illegal gambling was being conducted in both public taverns and fraternal and veterans' organizations. A new Sheriff had been elected who announced his intentions to equally enforce the criminal statutes against gambling. A new State's Attorney had been elected who, likewise, was prepared to discharge his responsibilities equally. A new State Senator had also been elected and it was to him that the private fraternal and veterans' organizations turned.

Alleging that their good public works were financed by their limited gambling activities, they sought the inclusion of Washington County into then existing Section 255(a). They maintained that failure to be included would result, if the new Sheriff and State's Attorney acted to stop gambling, in the cessation of monies for a multitude of worthy causes. It was the position of the fraternal and veterans' organizations that gambling funds did not and would not be used to enhance the coffers of those organizations, but would be utilized for the public good. As a

In support of their motions, the Defendants cite the case of Wheeler v. State, 281 Md. 593 (1977). There, John W. Wheeler was convicted of distributing an obscene magazine in violation of Section 418 of Article 27. That Section,

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result of those representations, Senate Bill was introduced in the 1975 Session of the General Assembly and was enacted into law as Chapter 46 of the Acts of 1975.

Ever since, gambling activities of fraternal organizations and veterans' groups has been the subject of continuing controversy in Washington County. It is interesting to note that at no time since the inclusion of Washington County in Section 255(a) has there ever been any public allegation that any volunteer fire company, civic, religious or charitable organization has ever conducted itself in the manner of the fraternal and veterans' organizations.

In the fall of 1980, the State's Attorney for Washington County announced his intentions to bring criminal charges against those who conducted extensive, open and notorious gambling. The action taken by the State's Attorney was required by his oath of office, but the actions taken were also courageous. It

enacted along with others in 1977, made it a crime for any person to send, to bring or cause to be brought for sale or distributions or to prepare, distribute, possess with intent to distributed or exhibit obscene matter in this state. By amendment in 1968, Section 417(2) of Article 27, excluded from the definition

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was not politically popular for him to do so; in fact, it was a politically harmful thing to do. By that time, "club gambling" had become a powerful force fueled by considerable funds. Greed and avarice had begun to grow as gambling revenues grew. In February, 1981, charges were brought against nine clubs and during the course of those prosecutions, threats were made and an ugly atmosphere was apparent in this otherwise peaceful and tranquil community. The State, after obtaining several convictions, suspended prosecutions to await prosecutions to await the ruling of the Appellate Courts. In July, 1982, the Court of Appeals rendered its opinions in American Legion v. State, 294 Md. 1 (1982). There, the Court held that the complained of conduct, while possessing the elements of a lottery, was not a lottery but was within the scope of Section 255(a) and therefore, exempt.

of person, an employee of anyone operating a theater which shows movies if the employee had no financial interest in the theater. There was no ambiguity in the language of either section and the Court did not have to look elsewhere for legislative intent. The purpose of the legislation was clearly to deter the dissemination of obscene matter by making certain acts a crime. The all-encompassing application of the prohibi-

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In its opinion, the Court assumed that the Legislature in 1975 was aware of the Court's decision in Bender v. Arundel Arena, Inc., 248 Md. 181 (1967). The court assumed too much. The Legislature was, however, aware of the opinions of the Attorney General of Maryland which had construed the language of Section 255(a) to permit only occasional gambling and not permanent or semi-permanent gambling. See 54 Opinions of the Attorney General 161-162 (1969) and 56 Opinions of the Attorney General 119 (1979). In any event, the Court in American Legion v. State was not asked and did not consider the question placed before this Court by the Defendants in their motion to dismiss.

tions to any individual and every legal entity was limited by the 1968 amendment. That amendment created an exemption to the application of the act. Thus, the statute established two classes; a class of individuals who are guilty of a crime if they engage in certain conduct and a second class who is not guilty of a crime if they engage in the same conduct. Wheeler successfully challenged his conviction of violating Section 418 because when it was read together with Section 417(2) he was denied equal protection of the law.

The Defendants here claim that when the lottery statutes are read together with Section 255(a) of the gaming statutes, that they too are denied equal protection of the law. They claim that the acts they engaged in at the Locker Room-Stag Bar would have been

lawful if they had engaged in them at the Moose, Elks or Eagles' Clubs or at the AmVets, V.F.W., Funkstown or Morris Frock American Legions.

Equal protection analysis requires strict scrutiny of legislative classification when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. When fundamental rights or a suspect class are involved, the classification must be subjected to close judicial scrutiny and must be justified by a compelling state interest. Wheeler v. State, 281 Md. 593 at 601 (1977).

A legislative classification must be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate governmental

interest. The reasonable basis test requires at a minimum that a statutory classification bears some rational relationship to a legitimate state purpose or that the legislative classification rest upon some ground of difference having a fair and substantial relation to the object of the legislation. The person who assails a legislative classification has the burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary. Equal protection does not require that all person be dealt with identically, but it does require that a distinction made have relevance to the purpose to which the classification is made. Wheeler v. State at 602-603.

Article, 27, Section 356-371B constitutes a subtitle known as "Lotteries". By its enactment, it was the obvious

intention and unmistakable purpose of the Legislature to broadly inhibit the creation, sponsorship, promotion, conduct and operation of lotteries. Silbert v. State, 12 Md. App. 516 (1971). A lottery is a species of gaming, the classic elements of which are consideration, chance and prize.

Article 27, Section 237-264A constitutes a subtitle know as "Gaming". This state seems to have drawn a distinction between games of chance and games of lottery. The lottery laws cover schemes for awarding a prize by lot or chance in which the only direct or personal participation by the seeker of the prize is his purchase of a ticket or its equivalent. The gaming laws cover gambling by games of chance or gaming tables in which the player participates personally and directly and is present

when the game ends and the result becomes know. Bender v. Arundel Arena, Inc., 248 Md. 181 (1967). In American Legion v. State, it was held that the conduct engaged in had the elements of a lottery but the Legislature by placing the exemption under the "gaming" subtitle intended that such gambling activities not be considered lotteries even though they possess elements of a lottery.

Here, in the case at hand, there is no question that the activity engaged in by these Defendants and the activities engaged in by the American Legion were the same identical acts and conduct. The question then becomes what legitimate state purpose is furthered or what reason exists for treating the same conduct differently. The Court of Appeals in American Legion v. State found that the broad purpose of Section

255(a) was to permit organizations to raise funds for their benefit through a broad range of gambling activities (Emphasis supplied). The court referred to service or charitable organizations but the Act is much broader than that. It also includes volunteer fire companies, civic, and religious organizations as well.

Section 255(a) includes a broad range of groups and organizations and it permits a broad range of gambling activity. It is clear from the evidence before this Court that some of the organizations included in Section 255(a) have interpreted the Legislature's including them within the exemption to be a license to conduct unlimited gambling activities for their own gain while in competition with private enterprise.

The evidence in this record is clear that a number of fraternal and veterans' organizations in Washington County have, under the protection of Section 255(a), established large food, beverage and liquor operations utilizing gambling proceeds. It is clear that they have engaged in cost cutting and subsidized social events with gambling proceeds. It is clear that they have held themselves out as private organizations while in fact permitting any member of the public to gain entrance without being a member. It is clear that they have bought and/or constructed large social halls utilizing gambling revenues and that they have been able to pay off large mortgages in short periods of time with their gambling proceeds and that they have used large cash payments to further extent their operations. At the same time that they

have been competing with taverns, restaurants and banquet facilities and underselling them, they have been holding themselves out to the public as benefactors of worthy public causes. In fact, the parsimony of the fraternal and veterans' organizations who appeared before this Court have been such that they make Ebenezer Scrooge look like a philanthropist in comparison.[2]

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2 For years, the officers of various fraternal and veterans' organizations have been quoted in the Herald-Mail about the claimed generous contributions made from gambling revenues. The President of the Club Association at one time publicly stated that fifty percent of gambling revenues went to local charities. On another occasion twenty-one private clubs placed a full page ad in the Herald-Mail which threatened the reduction or stoppage of the money given to charities from gambling revenues. The class distinction established by Section 255(a) has consumed a substantial amount of time and attention as its unfairness became more and more apparent. See the Herald-Mail 8/8/79, 9/8/80, 1/7/81, 1/12/81, 1/19/81, 1/21/81, 1/27/81, 1/31/81/ 2/10/81, 2/11/81, 2/12/81,

During the 1983-84 period just ended, two American Legion Posts and one fraternal club raised more than one million three hundred thousand dollars from gambling. That amount exceeds the whole budge of the United Way fro Washington County. At the same time those three groups gave away only a small fraction of that money for charitable works. The bulk of the gambling revenues raised went to subsidize their unfair competition with private enterprise. The money raised was spent in a

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2/16/81, 3/12/81, 3/16/81, 3/18/81, 3/20/81, 4/2/81, 4/9/81, 4/10/81, 5/27/81, 5/28/81, 6/23/81, 7/8/81, 7/14/81, 7/21/81, 7/22/81, 7/23/81, 7/30/81, 7/31/81, 8/1/81, 8/5/81, 8/14/81, 9/15/81, 9/16/81, 9/17/81, 9/24/81, 9/25/81, 11/20/81, 11/24/81, 12/12/81, 1/11/82, 1/12/82, 2/5/82, 3/13/82, 2/19/82, 3/5/82, 4/9/82, 4/12/82, 7/21/82, 7/22/82, 7/24/82, 9/9/82, 12/30/82, 12/31/82, 1/15/83, 1/6/83, 1/24/83, 2/9/83, 2/10/83, 3/10/83.

self-serving way and not in the furtherance of any legitimate state interest. There is no justifiable, legitimate reason to grant such privileges as those bestowed by Section 255(a) to such fraternal and veterans' organizations. Such legislation does, in fact, constitute class legislation in its purest sense. It is discriminatory, arbitrary and has no reasonable relationship to the subject matter of the gaming or lottery subtitles.

It should be noted that no credible evidence was offered or produced by the State of any substantial reason in support of the classification attempted by Section 255(a).

This Court believes that the Defendants here have met their heavy burden of proof. The conduct engated in by the Defendants is a crime and that

conduct is not a crime when engaged in by fraternal and/or veterans' organizations. The statutory discrimination established by Section 255(a) is not based on differences which are reasonably related to the purpose of the Acts in which it is found and the distinction as applied to fraternal and veterans' organizations has no relevance to the purpose for which the classification is made. It clearly denies these Defendants equal protection of the laws in violation of the 14th amendment of the Federal Constitution and Article 24 of the Maryland Declaration of Rights.

Having found such a violation, it is the holding of this Court that 255(a) of Article 27 is unconstitutional and void. The motion of the Defendants shall be granted and the charges against each

Defendant shall be dismissed.

John P. Corderman
Judge

ORDER OF COURT

Pursuant to the Memorandum Opinion attached hereto, it is this 7th day of January, 1985, by the Circuit Court for Washington County ORDERED that the criminal charges in No. 3885 Criminal Appeals, No. 3886 Criminal Appeals and No. 3887 Criminal Appeals are hereby dismissed against all Defendants.

John P. Corderman
Judge

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. ___

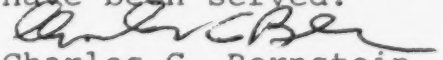
Richard W. Wyand, Sr.,
Roy Miller Snyder, Jr., and
Albert L. Bryan, Petitioners

v.

State of Maryland, Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of February, 1986, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Steven Sachs, Attorney General of Maryland, and one copy to C. J. Messerschmidt, Assistant Attorney General, Attorney General's Office, 7 North Calvert Street, Munsey Building, 2nd Floor, Baltimore, Maryland 21202, counsel for the respondent. I further certify that all parties required to be served, have been served.



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Supreme Court, U.S.
FILED
MAR 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1338

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD W. WYAND, SR.,
ROY MILLER SNYDER, JR. AND
ALBERT L. BRYAN,

Petitioners,

v.

STATE OF MARYLAND,

Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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COUNTERSTATEMENT OF QUESTION PRESENTED

Is a Maryland statute permitting certain nonprofit organizations to conduct gambling activities that commercial enterprises are prohibited from conducting, facially violative of the Equal Protection Clause of the Fourteenth Amendment because it lacks a rational relationship to any legitimate governmental interest?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1338

RICHARD W. WYAND, SR.
ROY MILLER SNYDER, JR. and
ALBERT L. BRYAN, Petitioners

v.

STATE OF MARYLAND, Respondent

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Respondent, the State of Maryland, by its attorneys, Stephen H. Sachs, Attorney General of Maryland, Dennis M. Sweeney, Deputy Attorney General, and C. J. Messerschmidt, Assistant Attorney General, respectfully requests that this Court deny

the petition for writ of certiorari filed in this case.

COUNTERSTATEMENT OF THE CASE

Petitioners are the owner and two employees of the "Locker Room Stag Bar" in Hagerstown, Maryland. They were convicted in the District Court of Maryland of conducting gambling operations at their place of business, in violation of Maryland laws prohibiting gambling for private profit.

Petitioners appealed to the Circuit Court of Maryland, contending that the charges against them were improper, inasmuch as Article 27, §255(b) of the Maryland Code authorizes various service-oriented organizations to conduct certain gambling activities. Petitioners asserted that the authorization violates state and federal constitutional guarantees of equal protection because it does not prohibit the described

organizations from using the proceeds of their gambling activities for the organizations' own benefit. Following a de novo hearing, the Circuit Court held that the statute is not rationally related to a legitimate governmental purpose and therefore is unconstitutional and void.

The State appealed to the Court of Appeals of Maryland, arguing that Article 27, §255(b) is rationally related to the State's legitimate interest in the entire range of functions performed by the organizations to which the statute applies. The Court of Appeals concluded that the General Assembly could legitimately seek to promote the existence of organizations of the types described in §255(b) and, consequently, that the statute is constitutional. Accordingly, it reversed the judgment of the Circuit Court and remanded the case to that court for trial of the charges against petitioners.

REASONS FOR DENYING THE WRIT

The only issue in this case is whether a statutory exemption from Maryland's anti-gambling statutes that is applicable only to various civic and other organizations is unconstitutional on its face. In their petition for the writ of certiorari, petitioners - for the first time - assert that the statute is somehow unconstitutional as applied. (Petition at 10-11.) That issue was never presented to or decided by the lower courts. Hence, it cannot now be raised in this Court.

Moreover, the decision of the court below - that the statute petitioners complain of does not violate the Equal Protection Clause - in no way conflicts with decisions of this Court or of other state courts and, indeed, is clearly correct. Accordingly, review of that decision by this Court is unwarranted.

1. **No Question of Constitutionality "As Applied" Is Properly Before This Court.**

The statute petitioners challenge provides that "any volunteer fire company or bona fide fraternal, civic, war veterans', religious or charitable organization" may conduct gambling activities for its own benefit. Throughout the proceedings in this case, petitioners' sole contention has been that this statute, on its face, creates a favored class in violation of the Equal Protection Clause. See Brief of Appellees at 1-2, State v. Wyand, 304 Md. 721, 501 A.2d 43 (1985) (Respondent's Appendix). On that basis alone, they have sought invalidation of that statute and, with it, the entire statutory scheme prohibiting commercial gambling in Maryland, under which they were charged and convicted.

Moreover, the issue of the statute's facial validity is the only issue that was

decided by the Court of Appeals of Maryland. In reviewing state court decisions, this Court has consistently refused to decide federal constitutional issues neither presented to nor decided by the state court. Webb v. Webb, 451 U.S. 493, 498-99, 101 S.Ct. 1889, 1893, 68 L.Ed.2d 392 (1981).

Even were that not the case, it is clear that petitioners' contention is utterly baseless. Petitioners purport to rely on Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), yet they offer nothing to indicate how Maryland's exemption of various organizations from its anti-gambling statutes may have been applied to the detriment of any racial or other minority. The reason for that omission is readily apparent - no evidence of such discriminatory application of the law exists. This is simply not a case in which a law "fair on its face" has been administered "with an evil eye

and an unequal hand." 118 U.S. at 373-74, 6 S. Ct. at 1073, 30 L.Ed. at 227.

2. The Decision of the Court Below Does Not Conflict with Decisions of This Court.

The ground of petitioners' equal protection claim is their contention that the exemption statute is ineffective to achieve the purpose for which they assert it was enacted. As the court below correctly recognized, such a contention does not rise to the level of a challenge to the constitutionality of a statute enacted - as this one was - in the proper exercise of the State's police power. When such a statute is at issue, "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." City of Cleburne v. Cleburne Living Center, 473 U.S. ___, ___, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313, 320 (1985).

Petitioners suggest that the decision of the court below somehow conflicts with the decision of this Court in Cleburne. That suggestion is completely without merit. In Cleburne, the city had required a special use permit for a group home for mentally retarded individuals in a zone in which it would not have required such a permit for boarding houses, fraternity or sorority houses, and similar uses. This Court considered the possible grounds for the distinction and concluded that the group home did not differ from the permitted uses in any way that would cause the group home to pose a special threat to the city's legitimate interest. 473 U.S. at ____, 105 S.Ct. at 3259, 87 L.Ed.2d at 325. Accordingly, the Court held that the requirement was invalid as applied to that group home.

In deciding the present case, the court below followed a similar line of analysis.

BEST

It took note of the differences between the exempt organizations and private commercial enterprises. The state court also noted differences between gambling activities conducted for the benefit of those organizations and gambling conducted purely for private profit. Thus, the decision below is in full accord with the decision of this Court in Cleburne. That the two decisions reached differing results is merely a reflection of the different facts of the two cases.

Moreover, in Cleburne this Court pointed out that "[w]hen social or economic legislation is at issue, the Equal Protection Clause allows the states wide latitude" in determining the best means of pursuing their interests. 473 U.S. at ___, 105 S. Ct. at 3254, 87 L.Ed.2d at 320. Thus, in declining to closely scrutinize the legislative choices in this case, the court below adhered closely to this Court's exposition of the Equal Protec-

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tion Clause in Cleburne. Accordingly, there is no ground of conflict between that decision and the decision of the court below in this case.

3. There Is No Conflict With Any Decision of Another State Court.

Petitioners assert a conflict between the decision of the court below in this case and the decision of the Supreme Court of Indiana in Fairchild v. Schanke, 232 Ind. 480, 113 N.E.2d 159 (1953). That case, however, is clearly distinguishable on both its law and its facts.

The Fairchild decision was not based on the Fourteenth Amendment to the United States Constitution. Instead, it rested on a provision of the Indiana constitution that prohibited the "'grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.'" 232 Ind. at 486,

113 N.E.2d at 162 (quoting Indiana Constitution, Article 1, §23). The Indiana court had earlier interpreted that provision as requiring that, when legislative classifications are made, "the reason for the classification must inhere in the subject-matter. The classification must rest upon some reason which is natural and substantial." Evansville & Ohio Valley Railway Co. v. Southern Indiana R.V. Corp., 231 Ind. 648, 654, 109 N.E.2d 901, 904 (1953). Thus, the State law that was the basis for the decision in Fairchild required that a legislative classification be more than simply the "rational means to serve a legitimate end" that is all the Equal Protection Clause requires in this case. See Cleburne, 473 U.S. at ___, 105 S.Ct. at 3255, 87 L.Ed. at 321.

Further, the statute at issue in Fairchild differed significantly from the

statute at issue in the present case. The Indiana statute had been enacted with the express purpose "'to restrain all persons from seeking profit from gambling activities in this State.'" Fairchild, 232 Ind. at 489, 113 N.E.2d at 161 (emphasis added by court). Nonetheless, the statute contained an exclusion from its provisions for religious, patriotic, charitable, and fraternal organizations. That exemption provision directly contravened the stated legislative purpose of the anti-gambling statute of which it was a part.

In sharp contrast, the exemption challenged in this case is a wholly separate statute from those generally prohibiting gambling in Maryland and was enacted for the stated purpose of permitting the described organizations to raise funds for their own benefit. American Legion v. State, 294 Md. 1, 9, 447 A.2d 842, 846 (1982). Thus, it is

clear that the statute at issue in this case differs significantly in both purpose and effect from that at issue in Fairchild. Under such circumstances, the bare fact of a difference in the outcomes of the two cases is in no way indicative of a genuine conflict between the decisions.

4. The Decision Below Was Clearly Correct.

The court below held that the statute at issue in this case is rationally related to a legitimate governmental purpose. Petitioners attempt to challenge that holding by asserting that the court misread the intent of the Maryland General Assembly in enacting the statute - an assertion that raises only a question of state law. The purpose served by the statute is expressed in its authorization of gambling activities "for the exclusive benefit of" the sponsoring organization. In light of the statutory language, the Maryland

Court of Appeals has previously pointed out that "the broad purpose of the Act ... is to permit service or charitable organizations to raise money for their benefit through a broad range of gambling activities." American Legion v. State, 294 Md. at 9, 447 A.2d at 846 (1982).

Unquestionably, the Court of Appeals was correct in noting that "the promotion of general charitable, civic, educational and public safety purposes is a proper object of legislation." State v. Wyand, 304 Md. 721, 728, 501 A.2d 43, 47 (1985). Cf. 26 U.S.C. §501(c) (exempting all income of various organizations from federal income tax). The organizations described in the exemption statute have as their purpose the promotion of just such objects. Accordingly, the court below correctly held that there is a rational basis for the enactment of this statute. Indeed, the contrary holding might well have

cast doubt on the validity of a wide variety of statutes benefiting the described organizations or their members, such as tax exemptions and veterans' employment advantages. See State v. Wyand, 304 Md. at 728-29, 501 A.2d at 47 (noting various statutory benefits).

CONCLUSION

The only federal question properly before this Court is whether a statute authorizing various civic, veterans', and other organizations to conduct gambling activities for their own benefit is invalid on its face, as a violation of the Equal Protection Clause. The decision of the court below upholding the validity of that statute in no way conflicts with decisions of this Court or of the courts of other states. Therefore, review of the decision by this Court is unwarranted, and respondents

respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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March, 1985

APPENDIX

Brief and Appendix of Appellees, p. 1-2.

IN THE

COURT OF APPEALS OF MARYLAND

NO. 48, SEPTEMBER TERM, 1985

STATE OF MARYLAND
APPELLANT

VS.

RICHARD W. WYAND SR.,
ROY MILLER SNYDER, JR.,
AND
ALBERT L. BRYAN
APPELLEES

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT
FOR WASHINGTON COUNTY
(John P. Corderman, Judge)

BRIEF AND APPENDIX OF APPELLEES

STATEMENT OF THE CASE

Appellees deem this portion of Appellant's brief accurate and adequate as a statement.

QUESTIONS PRESENTED

1. Is Article 27, Section 255 - author-

izing civic, charitable, and other nonprofit organizations to conduct gambling activities that commercial operators are prohibited from conducting - so lacking in a rational relationship to any legitimate governmental interest as to violate constitutional guarantees of equal protection of the laws?

A. The Factual Picture Developed By the Record

B. The Case Law

2. If Article 27, Section 255 is unconstitutional and void, was it proper for the Trial Court to dismiss the charges against Appellees?

STATEMENT OF FACTS

Appellees deem this portion of Appellant's brief to be accurate and adequate for the purpose.

ARGUMENT

I.

THE EXEMPTION PROVIDED BY SECTION

BEST AVAILABLE COPY